SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1975

Misc. No. 75-620

SAMUEL NEIDORF and MARIA GLICKMAN, Executrix of the Estate of Mannes N. Glickman, Deceased,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to Be Directed to the United States Court of Appeals for the Ninth Circuit.

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SAMUEL NEIDORF and MARIA GLICKMAN, Executrix of the Estate of Mannes N. Glickman, Deceased,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to Be Directed to the United States Court of Appeals for the Ninth Circuit.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Samuel Neidorf and Maria Glickman, Executrix of the Estate of Mannes N. Glickman (herein designated "Petitioner"), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 4, 1975, reversing, by a vote of 2-1 *in a matter of first impression interpreting the federal statute of limitations,* a Summary Judgment of the District Court in favor of Petitioners holding that the tort claim of the United States was barred under the federal statute of limitations, 28 U.S.C. Section 2415 (Appendix A, *infra,* pp. 1-2.)

Opinions Below.

The order of the District Court granting Summary Judgment to Petitioners is unreported; but was delivered from the bench as printed in Appendix B hereto, *infra*, pp. 3-10. The majority opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, pp. 3-10, is reported in .... F.2d .... (1975). The concurring and dissenting opinion of Chief Judge Richard H. Chambers also is printed in Appendix B hereto, *infra*, pp. 10-13.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 4, 1975; Appendix B, pp. 3-13, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented.

1. What constitutes a claim by the United States against private parties "founded upon a tort," and therefore required under the applicable federal statute of limitations (28 U.S.C. §2415(b)) to be commenced within three years?

2. Can the United States by unilaterally characterizing as "quasi-contractual," conduct shown on its face to be tortious, arbitrarily expand upon the powers conferred by Congress and extend from three years to six years the applicable federal statute of limitations?

3. Can the United States, contrary to the generally accepted substantive law, characterize an alleged fraudulent conveyance as "non-tortious" conduct and

thereby extend from three years to six years the applicable federal statute of limitations?

Statute Involved.

The statutory provisions involved are subsections (a) and (b) of 28 U.S.C. Section 2415. They are printed in Appendix A, *infra,* pp. 1-2.

Statement.

1. On July 18, 1966, Congress enacted Section 2415 of Title 28, U.S. Code, imposing a statute of limitations upon damage suits by the United States. Under subsection (g) of 28 U.S.C. Section 2415, any right of action accruing prior thereto is deemed to have accrued on July 18, 1966. Subsection (b) of 28 U.S.C. Section 2415 requires that any action "founded upon a tort" must be commenced within three years.

2. On February 2, 1972—more than 5½ years after any right of action allegedly accrued—the United States commenced the instant action against Petitioners Neidorf and Glickman in the District Court for the Central District of California.[1] The United States specifically entitled its Action: "Complaint for Damages for

[1]Concurrently, the United States also filed a second, identical action in the District Court of New Jersey against two other defendants: Michael Klebanoff and Sydney A. Gutkin. The New Jersey suit alleges the same facts and seeks the same total damages from Klebanoff and Gutkin as the California case seeks from Neidorf and Glickman. Thus theoretically the United States could recover doubly for the same alleged wrongs. *The District Court of New Jersey has also granted summary judgment to defendants.* As here, the United States appealed; its appeal now is pending before the Third Circuit Court of Appeals,

(This footnote is continued on next page)

Transfer of Corporate Asset in Fraud of Judgment Creditor." Jurisdiction of the District Court was founded upon the provisions of 28 U.S.C. Section 1345.

3. On January 3, 1973—eleven months after commencing its action—the United States filed a First Amended Complaint, simply changing amounts and certain minor details. The United States again entitled its action specifically: "Complaint for Damages for Transfer of Corporate Asset in Fraud of Judgment Creditor."

4. Then only three months later, on March 8, 1973, the United States filed a Second Amended Complaint, again making only minor changes, *but this time inexplicably removing from the caption all of the previous descriptions and title of the action.* Apparently, the United States had suddenly become aware that its claim for the tort of fraud was barred by the statute of limitations and responded by removing the title from the Complaint to obscure that the action was one clearly founded upon a tort.

5. In all three versions of its Complaint, the United States alleged that in the years 1953 and 1954, while renegotiation claims for excessive profits were pending against Hermetic Seal Products Company, Puerto Rico, a Puerto Rican corporation (hereinafter designated "Hermetic Seal") Neidorf, Glickman, Gutkin and Kle-

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bearing Clerk's Docket No. 73-2071. It is therefore possible that inconsistent rulings may soon occur between the Third Circuit and the Ninth Circuit pertaining to the identical facts, circumstances and occurrences herein.

banoff, as officers and directors of Hermetic Seal, caused Hermetic Seal to distribute to themselves "and others", as shareholders of Hermetic Seal, some $2,025,000 in dividends through an alleged dummy corporation, Western Hemisphere Industries, Inc.; and that capital stock of certain affiliated corporations was transferred to Hermetic Seal, and in that transaction Neidorf, Glickman, Gutkin and Klebanoff allegedly caused themselves "and others" to obtain monies from Hermetic Seal "with the intent to defraud" the United States as a then "potential" creditor on its then "potential" renegotiation claim against Hermetic Seal. The Complaint alleged that the distributions of said monies by defendants rendered Hermetic Seal "insolvent and without sufficient assets to satisfy [the United States'] renegotiation debt as finally determined to be due and owing. . . ."[2] The Complaint prayed for judgment against defendants Neidorf and Maria Glickman, Executrix, in the sum of $973,500 plus interest.[3]

6. In April, 1973, Petitioners Neidorf and Glickman each moved for summary judgment in the District Court for the Central District of California on the ground that it appeared from the face of the Complaint that the action stated a claim for money damages

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[2]In fact, it was not until 1961, seven years after the alleged fraudulent transfers, that the United States first recovered any civil judgments against Hermetic Seal.

[3]The New Jersey action also sought recovery of the same $973,500 from Klebanoff and Gutkin. Neither the New Jersey nor the California Complaint referred to the existence of the other action, although the names of the same four alleged wrongdoers were recited in each case.

"founded upon a tort" which had accrued more than three years prior to the filing of the action. Hence the action was barred under the provisions of 28 U.S.C. Section 2415(b).

7. On May 21, 1973, the District Court *granted* the motions of Petitioners and entered summary judgments in favor of Neidorf and Glickman.[4] Comments by the Court made at the time of its granting the summary judgments to petitioners are printed in Appendix B hereto, *infra*, pp. 3-13.

8. The United States appealed from the summary judgments for Petitioners.

9. On August 4, 1975, the Court of Appeals for the Ninth Circuit, in a 2-1 decision, reversed the summary judgments below, and remanded the matter for trial, on the sole ground that the Complaint did not state a cause of action "founded upon a tort."[5]

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[4]On September 27, 1973, summary judgments were entered in favor of defendants Klebanoff and Gutkin by the District Court in the New Jersey action.

[5]The Third Circuit Court of Appeals has now invited written comments from counsel for defendants Klebanoff and Gutkin as to how the decision of the Ninth Circuit should affect the appeal of the United States still pending in the Third Circuit; and any outcome in the Third Circuit may well be brought before this Court by way of another petition for Certiorari.

REASONS FOR GRANTING THE WRIT.

1. This Is a Question of First Impression Critical to the Proper and Uniform Application and Construction of the Federal Statute of Limitations, 28 U.S.C. Section 2415.

In enacting 28 U.S.C. Section 2415, Congress clearly intended to bar stale claims and to accord to private persons the same defenses in suits brought by the United States as are available to the United States when it is sued by private litigants.[6] There has developed a confused and conflicting body of law construing 28 U.S.C. Section 2415. *Cf. United States v. Dimeo,* 371 F.Supp. 95 (N.D. Ga. 1974); and *United States v. Limbs,* 356 F.Supp. 1004 (D. Ariz. 1973, appeal pending); with *United States v. Franklin National Bank,* 376 F.Supp. 378 (E.D.N.Y. 1973). This Court should now settle the question by establishing clear and equitable guidelines.

Here, the Court of Appeals for the Ninth Circuit has construed Section 2415 contrary to the expressed Congressional intent. In essence, it has sanctioned the United States unduly to delay the bringing of its claims by the use of semantic sophistry, extending the limita-

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[6]Excerpts from Senate Judiciary Committee Report No. 1328 issued in connection with H.R. 13652 enacted as Public Law 89-505 (28 U.S.C. Section 2415) are printed as Appendix C, *infra,* pp. 14-16. In part the report states:

> "Many of the contract and tort claims asserted by the Government are almost indistinguishable from claims made by private individuals against the Government. Therefore it is only right that the law should provide a time period within which the Government must bring suit on claims just as it now does as to claims of private individuals. The committee agrees that the equality of treatment in this regard provided by this bill is required by modern standards of fairness and equity."

tion period on an action from three years to six years simply by contending that the action is founded upon contract rather than tort—*regardless of the underlying facts.*

All of this was noted by Judge Chambers in the dissenting portion of his opinion below (Appendix B), wherein he stated:

> ". . . [T]he majority has not addressed itself to the policy which first prompted Congress to enact a statute limiting actions begun by the government, that is, that in the field of essentially private litigation, the government should stand on an equal footing with private litigants. In light of this policy, the court should be mindful that the trend among the states has been to regard fraudulent conveyances as, if not actual fraud, something very much like it, and to apply the usually shorter fraud statute of limitations. . . . To place a construction upon §2415 consistent with the prevailing practice would do no violence to the language of the statute, and would achieve a closer approximation of the Congressional intent. It might also inspire the government to move a little faster in the future than it did in this case."

The very factors pointed out in such Senate Report (Appendix C) as being the evils of intolerably delayed claims, are applicable in the instant case.

Here, the alleged wrongdoing took place in 1953 and 1954, *more than 18 years before the action was filed.*

Defendant Mannes Glickman, one of the alleged participants in the alleged wrongs, is now deceased. Because of the great lapse of time, memories of witnesses

will necessarily be dimmed and relevant documents will have long since been scattered or will have disappeared.

The United States has admitted that all of the material facts were known to it at least by July 18, 1966 when Section 2415 was enacted. Yet the United States delayed until February, 1972 to bring suit, 18 years after the alleged wrongdoing complained of, 11 years after it first obtained civil judgments against Hermetic Seal and more than 5½ years after enactment of Section 2415, Title 28, U.S. Code.[7]

The trial court in entering summary judgment stated as follows:

> "The hardest thing in the world for the Government to do, really, is to accept the limitations of its power. Day after day after day we sit here and tell the Government that the Bill of Rights says you cannot go that far and there is an agonizing expression when judicial limits are placed upon Governmental action. Congress has said there is a limitation on Governmental action . . . when it passed the Statute of Limitations. And if there ever was a case in which the justification of Congress in passing the Statute of Limitations is so evident, this is the case." (Appendix B.)

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[7]The Senate Committee report (Appendix C) states in this connection:

> "In the report filed in behalf of the General Accounting Office in this bill, the Comptroller General stated that as a matter of fairness, persons dealing with the Government should have some protection against an action by the government when the act occurred many years previously. The emphasis on fairness referred to by the Comptroller General and by the Department of Justice in recommending the legislation is a very important consideration and the principal basis for the bill."

2. The Decision of the Court Below Thoroughly Confuses the Law as to What Constitutes a Federal Action "Founded Upon a Tort." Ruling by This Court Is Required to Put the Matter at Rest for the Countless Civil Litigants Faced Annually With the Issue.

In the instant Complaint, the United States expressly alleged that the gravamen of defendants' alleged wrongful conduct was that they "intended to defraud the [United States] . . ." This is clearly an allegation of tort.

In its majority opinion, the Court of Appeals acknowledges that "[i]t may be that the facts alleged in the government's complaint state a cause of action in tort" against defendants, but "[n]onetheless, the government also states two claims against [defendants] as distributees of the corporate assets, neither of which is an action in tort." (Appendix B.)

Yet all of the acts of defendants are shown on their face to have been part of the *same* purportedly tortious scheme or plan "intended to defraud." This can only be an action in tort. Even the relief sought by the United States of joint and several liability is relief which is ordinarily sought only against joint *tortfeasors.*

A federal civil litigant attempting henceforth to determine whether his action based on alleged acts of fraud is one founded upon a tort, must be confused and misled to his prejudice if the decision below is allowed to stand. No litigant will be able definitely to discern whether a three-year or a six-year limitations period properly should apply.

3. The Decision of the Ninth Circuit Court of Appeals May Soon Be in Direct Conflict With the Decision of the Court of Appeals for the Third Circuit in United States v. Klebanoff and Gutkin. (No. 73-2071.)

The identical issues decided below are now pending on an appeal before the Third Circuit, which may not accept the construction given Section 2415 by the Ninth Circuit.

4. The Decision of the Ninth Circuit Erroneously Established That a Cause of Action to Recover Fraudulent Conveyances Is Not an Action "Founded Upon a Tort" for Purpose of Section 2415.

By misconstruing and erroneously applying the holding in *United States v. Franklin Nat'l Bank*, 376 F.Supp. 378, (E.D.N.Y. 1973) the Court of Appeals has incorrectly set forth for future litigants the proposition that a six-year statute of limitations applies to an action to recover fraudulent conveyances.[8] Unless reviewed and corrected by this court, such an erroneous implication will seriously mislead to their prejudice countless future litigants.

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[8]The *Franklin National Bank* case applied state law (New York), to determine whether an action under the Uniform Fraudulent Conveyance Act sounds in tort, then rejected the concept of analyzing the state law for guidance to characterize the action for limitations purposes. The inconsistency of such selective analysis is manifest. It should be noted that the California courts, and, prior to the opinion below, the federal courts in California have uniformly characterized an action to set aside a fraudulent conveyance as sounding in fraud, and not in any form of quasi-contract, particularly for purposes of applying the statute of limitations. *First Presbyterian Church of Santa Barbara v. Rabbitt*, 118 F.2d 732, 735 (9th Cir. 1940); *Costello v. Atlas Corp.*, 297 F.Supp. 19, 22 (N.D. Cal. 1967); *Pedro v. Soares*, 18 Cal.App.2d 600, 609, 64 P.2d 776 (1937); see *Brunvold v. V. Johnson & Co. Inc.* 59 Cal.App.2d 75, 138 P.3d 32 (1943).

5. The Decision of the Ninth Circuit Essentially Creates a New Limitation Period Not Intended by Congress, by Categorizing Certain Fraud Actions as Being in "Quasi-Contract" Rather Than Founded Upon a Tort.

By construing the liability of the transferee of a fraudulent conveyance as being in "quasi-contract" rather than in tort, the Court of Appeals has gone against the majority of substantive law and has incorrectly created for future litigants a new limitations period not intended by Congress for fraudulent conduct historically characterized as tortious. (See opinion of Judge Chambers, Appendix B.)

Moreover, even the *concept* of quasi-contract is inapplicable under the instant facts: the Court of Appeals misconstrued the entire Complaint in asserting that it set forth facts alleging that defendants were transferees of fraudulent conveyances and distributees of improper dividends and thus obligated under theories of quasi-contract.

An action to set aside a fraudulent conveyance is one which permits the creditor to satisfy his claim out of funds actually in the hands of each alleged fraudulent transferee. Similarly, an action for restitution, whether of improper dividend or otherwise, is one wherein plaintiff seeks the recovery of specific benefits wrongfully retained. No such allegations are contained in the present action. The gist of the present action is to recover a general joint and several damage award against all defendants for the entire amount of $973,-

500, *irrespective* of the amounts each defendant may actually have received. Indeed, the Complaint does not even allude to the specific amounts of money or stock which either defendant Neidorf or Glickman purportedly respectively received. Thus, to classify the present action as one to set aside a fraudulent conveyance, or to obtain any form of restitutionary relief, does complete violence to the allegations actually recited in the complaint.

6. The Decision of the Ninth Circuit Erroneously Construed Excessively Strictly, Contrary to Congressional Intent, the Scope and Applicability of the Three-Year Statute of Limitations to Persons Defending Against Civil Claims by the United States.

By holding that a cause of action for alleged fraudulent conduct is *not* a cause of action "founded upon a tort" for purposes of the three-year statute of limitations contained in 28 U.S.C. Section 2415(b), the Court of Appeals has imposed upon all private parties defending against the United States, an extraordinary burden not intended by Congress. If permitted to stand, the apparent effect of the decision below is to permit the United States to act unilaterally in characterizing the nature of transactions for the purpose of delaying the commencement of actions where such delay is considered advantageous to the United States. Such construction of 28 U.S.C. Section 2415 is unreasonable and will be to the detriment of all persons conducting business with the United States.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari to review as a matter of first impression, the scope and construction of the federal statute of limitations, should be granted.

Respectfully submitted,

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APPENDIX A.

§ 2415. Time for Commencing Actions Brought by the United States.

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided,* That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: *Provided further,* That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further,* That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided,* That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought within eleven years after the right of action accrues.

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellant, vs. Samuel Neidorf and Maria Glickman, Executrix of the Estate of Mannes N. Glickman, Defendants-Appellees. No. 73-2993.

[August 4, 1975].

Appeal from the United States District Court for the Central District of California.

Before: CHAMBERS, MERRILL and WALLACE, Circuit Judges

WALLACE, Circuit Judge:

This case concerns the construction of the statute of limitations applicable to damage suits brought by the United States, 28 U.S.C. § 2415. The sole question on appeal is whether the government's complaint states a claim founded upon a tort, which must be sued upon within three years after it accrues, or founded upon "any contract express or implied in law or fact," which must be sued upon within six years. *Id* § 2415 (a), (b). The district court held that the government's claim, which was brought more than three years but less than six years after it accrued,[1] was founded upon

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[1]Before 28 U.S.C. § 2415 became effective in July, 1966, no statute of limitations restricted damage suits by the United States. United States v. Thompson, 98 U.S. 486 (1878). Although the events alleged in the government's complaint occurred prior to 1966, subsection (g) of the statute provides: "[A]ny right of action subject to the provisions of this section which accrued prior to the date of enactment of the Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act." 28 U.S.C. § 2415(g). This suit was filed in February, 1972.

tort and thus barred by section 2415. The court granted summary judgment in favor of Neidorf and the estate of Glickman and the United States appeals. We reverse.

In its complaint, the government alleged that while renegotiation claims for excessive profits were pending against Hermetic Seal Products Co. (Hermetic Seal), Neidorf, Glickman and Klebanoff,[2] as officers and directors of the corporation, caused it to distribute to themselves as shareholders $2,025,000 in dividends through a dummy corporation, Western Hemisphere Industries, Inc. In addition, through an intricate series of corporate maneuvers in which the capital stock of several affiliated corporations was transferred to Hermetic Seal, Neidorf, Glickman and Klebanoff allegedly caused themselves to receive $544,000 in cash directly from Hermetic Seal and $366,000 in cash indirectly through the dummy corporation, all with intent to prevent the government from collecting any of its renegotiation claims. The distribution of dividends and the capital stock transactions allegedly rendered Hermetic Seal insolvent and without sufficient assets to satisfy the government's claims.

In 1961, after the renegotiation proceedings had concluded, the government recovered judgments against Hermetic Seal totaling $975,000. Except for $1,500 in life insurance proceeds, execution on the judgments was returned unsatisfied in 1964, and the corporation has since gone out of business.

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[2]The United States brought a separate suit against Klebanoff in the United States District Court for the District of New Jersey (Trenton), United States v. Klebanoff, Civil Action No. 216-72. The government's appeal from summary judgment in favor of Klebanoff is now pending before the Third Circuit.

Appellees contend that the present suit is founded upon a tort and thus barred by section 2415(b): "[E]very action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues. . . ." It may be that the facts alleged in the government's complaint state a cause of action in tort against Neidorf and Glickman as officers and directors of Hermetic Seal, *But see* 1 G. Glenn, Fraudulent Conveyances and Preferences § 74, at 123 (rev.ed. 1940). Nonetheless, the government also states two claims against appellees as distributees of the corporate assets, neither of which is an action in tort.

First, the government alleges that Hermetic Seal had been rendered insolvent by direct and indirect distributions to Neidorf. Glickman and Klebanoff through the capital stock transactions. These allegations state a cause of action to recover fraudulent conveyences, *see United States v. Schofield*, 152 F. Supp. 529, 531 (E.D. Pa. 1957), an action not founded upon a tort for purposes of section 2415. *United States v. Franklin Nat'l Bank*, 376 F. Supp. 378 (E.D.N.Y. 1973). "Surely the action is not one for actual fraud where a complete cause of action may be stated by a showing of the bare facts of a voluntary conveyance resulting in insolvency." *Hearn 45 St. Corp. v. Jano*, 283 N.Y. 139, 143, 27 N.E.2d 814, 816 (1940). The alleged lack of good faith on the part of Neidorf and Glickman is relevant to lack of fair consideration. *See* Uniform Fraudulent Conveyance Act § 3. Moreover, even where proof of intent to hinder creditors' rights is necessary to set aside a fraudulent conveyance, Uniform Fraudulent Conveyance Act § 7, this requirement neither transforms the action

into one in fraud nor makes it "founded upon a tort" for purposes of 28 U.S.C. § 2415. *United States v. Franklin Nat'l Bank, supra,* 376 F. Supp. at 382-84.

> The fraud, such as it is, is only incidental to the right of the creditor to follow the assets of the debtor and obtain satisfaction of the debt. The gravamen of the cause of action . . . is the ordinary right of a creditor to receive payment. . . .

Hern 45 St. Corp. v. Jano, supra, 283 N.Y. at 143, 27 N.E.2d at 816.

Second, the complaint also states a cause of action against Neidorf and Glickman as shareholders for recovery of distributions that rendered the corporation insolvent. A creditor may sue for restitution of such payments, at least to the extent of the amount owed, without regard to any wrongdoing on the part of directors, officers or shareholders. *Landers Frary & Clark v. Vischer Prod. Co.,* 201 F.2d 319, 324 (7th Cir. 1953) (alternate holding); *Corporation Audit Co. v. Cafritz,* 156 F.2d 839, 842 (D.C. Cir. 1946); *Wood v. National City Bank,* 24 F.2d 661, 663 (2d Cir. 1928); *see* N. Lattin, Corporations §154 (2d Ed. 1971); R. Stevens, Corporations § 102, at 462 (2d ed. 1949). This liability, closely related to one for recovery of a fraudulent conveyence, is likewise not founded upon a tort.

Both the liability of the transferee of a fraudulent conveyance and the liability of a shareholder to a creditor of the corporation are based not upon tort but upon quasi-contract. 1 G. Glenn, *supra,* at §§ 56, 74, 239; H. Ballantine, Corporations § 255, at 600 (rev. ed. 1946); N. Lattin, *supra,* § 154, at 568.[3] *See Brown*

[3]The right of the creditor to follow an "illegal" dividend into the hands of an innocent shareholder if recognized, should not

v. O'Keefe, 300 U.S. 598, 606-07 (1937); *Platt v. Wilmot*, 193 U.S. 602, 612-13 (1904). True, unlike contract, the government claims against Neidorf and Glickman are not based upon any consensual relationship; but that is not required for quasi-contractual liability. "A quasi contractual obligation is created by the law for reasons of justice, without any expression of assent and sometimes even against a clear expression of dissent." 1 A. Corbin, Contracts § 19 (1963). Unlike the remedy in tort of compensatory damages, the remedy sought here is restitution of benefits received. *See* Corbin, *Quasi-Contractual Obligations*, 21 Yale L.J. 533, 550 (1912). Also, unlike tort, the liabilities here arise independently of any fraudulent conduct by either the transferee or the transferor. *United States v. Franklin Nat'l Bank, supra*, 376 F. Supp. at 381-82. They are imposed by law, predicated on the fact of the insolvency and justified on grounds of fairness.

The United States has six years to sue upon quasi-contractual claims. Section 2415(a) provides:

> [E]very action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues. . . .

"Contract implied in law" is a synonym for "quasi-contract." 1 A. Corbin, Contracts § 19 (1963). More

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be placed upon the trust fund doctrine, the theory that the assets of a corporation constitute a trust fund for the protection of creditors, or upon the theory of a fraudulent conveyance, but upon the theory of enforcing the superior equity or priority of a creditor to be paid out of capital. The liability, in the absence of statute, is of a quasi-contractual nature and should depend upon superior equities of the creditors.

H. Ballantine, Corporations § 255, at 600 (rev. ed. 1946).

importantly, the legislative history of 28 U.S.C. § 2415 specifies the quasi-contractual actions were to be subject to a six-year limitation. *Hearings on H.R. 13652 Before Subcomm. No. 2 of the Comm. on the Judiciary*, 89th Cong., 2d Sess., 7, 10 (1966); H.R. Rep. No. 1534, 89th Cong., 2d Sess., 4, 11 (1966); S. Rep. No. 1328, 89th Cong., 2d Sess., 2, 12 (1966), reprinted in 2 U.S. Code Cong. and Admin. News, 89th Cong., 2d Sess., 2502 (1966); 112 Cong. Rec. 6876 (1966) (remarks of Senator Ervin).[4]

Grouping quasi-contractual actions with those based upon consensual obligations is historically sound. The principal forms of action known at common law were tort and contract. Yet there was an entire category of actions sounding in neither contract nor tort that developed to compete with the remedies available in the chancery courts. Because the obligations underlying these actions generally resembled contract more than tort, they were enforced by the action of assumpsit.[5]

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[4]For example, the report of the House Judiciary Committee states:

> Subsection (a) of new section 2415 added by the bill provides for a 6-year limitation which would apply to all Government actions based on contracts whether express or implied in law or in fact. This provision would extend to obligations which are based on quasi-contracts.

H. R. Rep. No. 1534, 89th Cong., 2d Sess., 4 (1966).

[5]For instance, a judgment debtor is under a legal obligation to satisfy the judgment against him, but not because he has agreed to assume this obligation. Yet the common law permitted actions *ex contractu* on judgments, the judgment debtor's obligation being termed "quasi-contractual." Corbin, *Quasi-Contractual Obligations*, 21 Yale L.J. 534, 536-37 (1912). Another quasi-contractual obligation at common law was that imposed by statute or custom. For example, an action lay in assumpsit where a statute provided that anyone might break a log jam and recover his expenses from the owners of the logs. Woods v. Ayres, 39 Mich. 345, 347-55 (1878) (dictum). Often benefits bestowed voluntarily upon another without re-

See Keener, Quasi-Contracts 15 (1893). Because all rights enforced by assumpsit were regarded as "based on contract," 1 S. Williston, Contracts § 3, at 9-10 (Jaeger ed. 1957), in the absence of a specific statute the appropriate statute of limitations was that for actions *ex contractu*. Restatement of Restitution § 5 (1937); *see* 12 Fletcher, Cyclopedia of Corporations § 5430 (perm. rev. ed. M Wolf 1971). In 28 U.S.C. § 2415, Congress assigned limitations according to the common law division of actions. Thus, whenever the United States sues for damages, the substance of the claims must be characterized for purposes of section 2415 as sounding in either tort, contract or quasi-contract.[6] Because the present suit sounds in quasi-

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quest make the latter liable in quasi-contract. Thus one who found a boat adrift received his expenses in moving, repairing and caring for the boat from the owner who eventually claimed it. Chase v. Corcoran, 106 Mass. 286, 288 (1871). The central theme in these examples is unjust enrichment. *See* Restatement of Restitution, Introductory Note, at 4-9, § 1 (1937).

[6]We do not decide whether the government's claims in the present action are governed by federal common law or, because no inconsistent federal policies are involved, by reference to state substantive law. *See* 1A-Pt.2 J. Moore, Federal Practice §0.321 (2d ed. 1974). In the various states, actions to set aside fraudulent conveyances or to recover from shareholders are of both common law and statutory origin and are often enforced in equity as well as at law. Although the government has not invoked any particular state's law in either its complaint or argument, we note that most states have statutes patterned upon the Uniform Fraudulent Conveyance Act, including both New Jersey (where the improper distribution allegedly took place) and California (where the action was brought). Cal. Civ. Code § 3439 et seq.; N.J. Stat. Ann. § 25.2-7 et seq. Further, New Jersey has a specific statute making fraudulent conveyances of a corporation recoverable by a creditor of the corporation. N.J. Stat. Ann. §14A:14-10. However, even if such suits are governed by state law when brought by the United States, the limitation must be determined by reference to section 2415. United States v. Gera, 409 F.2d 117 (3rd Cir. 1969). The characterization of the claim as one in tort, contract or quasi-contract must also be a matter of federal law since the uniform limitations

(This footnote is continued on next page)

contract, the government's claim was not barred by section 2415.

Appellees argue that 28 U.S.C. § 2415(b) applies to all cases "founded upon a tort," and that this means the substance of the claim rather than the remedy dictates the applicable limitation. They admit that at common law one could waive a tort claim for damages and sue for restitution in quasi-contract, but they argue that the United States should not be able to increase the limitation from three to six years by characterizing the suit as one for restitution rather than damages. *See* Corbin, *Waiver of Tort and Suit in Assumsit,* 19 Yale L.J. 221, 234-38 (1910).

We agree that the substance of a claim and not its trappings should be the basis for applying the statute of limitations. However, we need not decide whether the government may waive the tort and sue in quasi-contract, because the government's claim is not founded upon any tort which could have been waived. We hold only that the alleged obligations of Niedorf and Glickman as transferees of fraudulent conveyances and distributees of improper dividends are essentially quasi-contractual liabilities to which the six-year limitation of section 2415(a) applies.

REVERSED AND REMANDED.

CHAMBERS, Circuit Judge, concurring and dissenting.

I agree with the majority that insofar as the complaint states a cause of action against Neidorf and Glickman as shareholders, the action is founded upon

established by the statute would be compromised if limitations varied according to the labels attached to identical causes of action by different states. *Cf.* United States v. Nardello, 353 U.S. 286, 293-95 (1969).

quasi-contract and the six-year limitations period applies. I cannot agree that the same holds true for the cause of action to set aside fraudulent conveyances.

The concept of a fraudulent conveyance arose in England from a hybrid statute[1] designed both to raise revenue and to punish offenders who sought to avoid the forfeiture of property to the Crown flowing from a conviction of treason or felony. 1 G. Glenn, Fraudulent Conveyances and Preferences §§ 61a and b, at 86-92 (rev. ed. 1940). After the concept became transformed into a device for the use of private creditors, the creditor was required, at a minimum, to have reduced his underlying claim to judgment before proceeding to attack the fraudulent conveyance either by way of execution or by a creditor's bill in equity. See Richardson v. Michel, 45 Cal. App. 2d 188, 195-201, 113 P.2d 916 (4th Dis. 1941); 1 G. Glenn, supra, § 85, at 144. One result of this split between proceedings at Law and in equity was that courts tended to look to the procedural posture of the cases before them in order to determine the appropriate statute of limitations. Thus in Hearn 45 St. Corp. v. Jano, 283 N.Y. 139, 27 N.E. 2d 814 (1940), the court held that the action was one for rescission of spurious judgments, an equitable action governed by a general residuary statute of limitations. Cf., Silverman v. Christian, 123 N.J.Eq. 506, 198 A.2d 832 (1938) (the equitable action cannot be brought after the legal action is barred).[2]

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[1]The Statute of Fraudulent Conveyances, 13 Eliz., c. 7 (1571).

[2]The chancellor in *Silverman* found it unnecessary to explain the nature of the action at law. He applied a general statute of limitations applicable to actions in contract, quasi-contract, and most torts.

Not surprisingly, the underlying nature of a fraudulent conveyance received relatively little attention.[3]

We are now faced with a federal statute which, although adequate for most purposes, calls upon us to say that a remedy developed to aid a judgment creditor in obtaining execution is "founded" upon either an express or implied contract or a tort, when in fact it is more likely to be neither. In making its choice, the majority has not addressed itself to the policy which first prompted Congress to enact a statute limiting actions begun by the government, that is, that in the field of essentially private litigation, the government should stand on an equal footing with private litigants.[4] In light of this policy, the court should be mindful that the trend among the states has been to regard fraudulent conveyances as, if not actual fraud, something very much like it, and to apply the usually shorter fraud statute of limitations. Anno., 138 A.L.R. 1289 (1940); *and see* United States v. Franklin Nat'l Bank, 376 F. Supp. 378, 383 (E.D.N.Y. 1973). To place a contruction upon § 2415 consistent with the prevailing practice would do no violence to the language of the

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[3]When the question has been considered, the issue not infrequently has been clouded by the creditor's reliance upon actual fraudulent intent rather than upon proof of insolvency and inadequate consideration. Hager v. Shindler, 29 Cal. 47 (1865); *see* Presbyterian Church of Santa Barbara v. Rabbitt, 118 F.2d 732 (9th Cir. 1941).

Under the Uniform Fraudulent Conveyance Act, a prior judgment is no longer necessary, and a creditor may seek both to establish his claim and to set aside a fraudulent conveyance in one action. But for limitations purposes, the distinction between these two objectives remains. 1 G. Glenn, *supra* §88, at 148-50.

[4]Letter from the Attorney General to the Vice President, H. R. Rep. No. 1534, 89th Cong., 2d Sess. (1966); 2 U.S. Code Cong. and Admin. News, 89th Cong., 2d Sess., at 2513 (1966); *see* United States v. Sabine Towing and Transportation Co., 289 F.Supp. 250, 253 (E.D. La. 1968).

statute, and would achieve a closer approximation of the Congressional intent. It might also inspire the government to move a little faster in the future than it did in this case.

Reporter's Transcript of Proceedings.
Monday, May 21, 1973.

Once in a while the Government is going to have to adopt a concept that the Government's business has to be conducted expeditiously. I think that once the Government learns that it is bound by a Statute of Limitations just the same as ordinary citizens and ordinary citizens have to be alert and pursue their remedies, maybe the Government will benefit a little bit by it.

* * * *

The hardest thing in the world for the Government to do, really, is to accept the limitations on its power. Day after day after day we sit here and tell the Government that the Bill of Rights says you cannot go that far and there is an agonizing expression when judicial limits are placed upon Governmental action. Congress has said there is a limitation on Governmental action when it passed the Statute of Limitations. And if there ever was a case in which the justification of Congress in passing the Statute of Limitations is so evident, this is the case. The case is an action, tort action, and the three-year Statute of Limitations applies.

APPENDIX C.

Government Suits—Statute of Limitations.

P.L. 89-505, see page 344

House Report (Judiciary Committee) No. 1534,
May 16, 1966 [To accompany H.R. 13652]

Senate Report (Judiciary Committee) No. 1328,
June 24, 1966 [To accompany H.R. 13652]
Cong. Record Vol. 112 (1966)

DATES OF CONSIDERATION AND PASSAGE
House June 6, 1966
Senate June 27, 1966

The Senate Report is set out.

SENATE REPORT NO. 1328

* * * *

Many of the contract and tort claims asserted by the Government are almost indistinguishable from claims made by private individuals against the Government. Therefore it is only right that the law should provide a period of time within which the Government must bring suit on claims just as it now does as to claims of private individuals. The committee agrees that the quality of treament in this regard provided by this bill is required by modern standards of fairness and equity.

Statutes of limitation have the salutary effect of requiring litigants to institute suits within a reasonable time of the incident or situation upon which the action is based. In this way the issues presented at the trial can be decided at a time when the necessary witnesses, documents, and other evidence are still available. At the same time, the witnesses are better able to testify concerning the facts involved for their memories have

not been dimmed by the passage of time. The committee feels that the prompt resolution of the matters covered by the bill is necessary to an orderly and fair administration of justice. Stale claims can neither be effectively presented nor adjudicated in a manner which is fair to the parties involved. Even if the passage of time does not prejudice the effective presentation of a claim, the mere preservation of records on the assumption that they will be required to substantiate a possible claim or an existing claim increases the cost of keeping records. As time passes the collection problems invariably increase. The Government has difficulty in even finding the individuals against whom it may have a claim for they may have died or simply disappeared. These problems have been brought to the attention of the committee previously in connection with other legislation. This bill provides the means to resolve these difficulties.

* * * *

Subsection (b) of section 2415 provides that tort actions, that is, actions based on damage or injury from a wrongful or negligent act, must be brought by the United States within 3 years after the right of action first accrues. This 3-year statute applies to all Government tort actions except those that are expressly referred to in this subsection and are governed by a 6-year statute. These specific actions are those which are of a type which might not be immediately brought to the attention of the Government or would only be uncovered after some investigation.

* * * *

In the report filed in behalf of the General Accounting Office in this bill, the Comptroller General stated that as a matter of fairness, persons dealing with the Government should have some protection against an

action by the Government when the act occurred many years previously. The emphasis on fairness referred to by the Comptroller General and by the Department of Justice in recommending the legislation is a very important consideration and the principal basis for the bill. The limitation periods fixed in the bill are similar to those fixed by Federal and State law for the same types of actions. While State laws, of course, show a variety of periods, it is possible to generalize and state that many jursidictions provide a 6-year statute of limitation as to contract action and the limitations for tort proceedings in most cases are from 2 to 3 years. It is readily apparent that the provisions of this bill were drafted in recognition of these facts.

* * * *

In recommending this legislation, the committee feels that it will provide a greater fairness as regards private individuals who deal with the Government while adequately providing for the interests of the Government. The Government will be barred from asserting old and stale claims in the courts and the necessity for the early assertion of claims will require increased efficiency in Government claims proceedings. The committee recommends that the bill, with the corrective amendments, be considered favorably.